

Proc I

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

Microcom Corp. CNG 0022910, 174

FILE: B-194173

DATE: May 14, 1979

MATTER OF: Aydin Vector Division

CNG 01703

[Protest of Navy Sole-Source Contract]

DIGEST:

- 1A Sole-source contract awarded under "public exigency" exception of ~~10 U.S.C. § 2304(a)(2) (1976)~~ cannot be questioned since: (1) number of items to be procured under contract has been justified; (2) no other firm could meet needed delivery schedule; and (3) price or cost analysis of proposed contract price was consistent with regulatory requirements given circumstances requiring urgent award.
- 2. Protest questioning issuance and method of "two-step" procurement, in which protester participated, ~~is~~ untimely filed under 4 C.F.R § 20.2(a) (1978) since protest was not filed prior to "step-one" closing date.

Aydin Vector Division (A-V) has protested a *AGC00455* sole-source contract awarded by the Naval Air Systems Command, Department of the Navy, to Microcom Corporation in late January 1979 for 120 "AN/DKT-37A telemetry sets." A-V states that, although "cancellation of the improper [Microcom] award is not now practicable," our Office should issue "an expression of disapproval" of the award in order to prevent future sole-source contracts.

Background

On July 17, 1978, the Navy issued step one of a "two-step" formally advertised solicitation (No. NOO019-78-B-0009) for 695 "AN/DKT-37B" telemetry sets. The Navy reports that the "B" model of the sets is "interchangeable with the A but is an improved version." Primarily because the "B" model had never been produced before, the Navy says it chose the "two-step" method so that it could evaluate step one technical proposals.

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The Navy further reports as to the procurement history of the solicitation, as follows:

"A review of the procurement * * * shows that despite good faith and diligence on the part of the Navy, continual time slippages occurred, primarily due to revisions to the data package. The ultimate result of these delays was to slip the anticipated award date from September 1978 to April 1979, and to slip first deliveries from October 1979 to May 1980. Since fleet inventories would be depleted about December 1979, the Program Office * * * notified the Contracting Officer of this status [in January 1979] and requested that an urgent procurement be made to fill the gap between the depleted inventory and first deliveries under the competitive contract. This quantity was calculated at 99, but 21 units were added to cover contingencies. In addition, a UMMIPS (Uniform Material Movement and Issue Priority System) priority designator 6 was issued because of the projected impact on fleet training. The older AN/DKT-37A model had to be purchased because it was the only version for which a producer was currently qualified and there was no time to permit qualification.

"Accordingly, the Contracting Officer, after satisfying himself that the competitive procurement could not meet these requirements in time, and after determining that no firm other than Microcom could make the delivery requirement in the time frame necessary, negotiated an urgent procurement under 10 U.S.C. 2304(a)(2) of 120 units with Microcom, the only qualified and prior producer of the AN/DKT-37A.

"* * * Had it not been for the problems with the data package, no emergency procurement would have been necessary. When Aydin-Vector inquired as to our plans in April 1978, the Navy had every reason to believe that it

could keep its competitive procurement on track. This was expressed to Aydin-Vector in the Navy's telegram of 27 April, 1978. NAVAIR was unable, however, to maintain its projected procurement schedule and was eventually required to purchase 120 units using 10 U.S.C. 2304(a)(2). NAVAIR does not agree that Aydin-Vector was a possible source. Aydin-Vector has not built an AN/DKT-37A and would have had to pass first article testing which would have prevented it from meeting the required delivery schedule of the urgency procurement. Consequently, there was no alternative but to go to Microcom. This decision was made only after the situation had been carefully considered by the Contracting Officer. NAVAIR released the synopsis to the Department of Commerce on 1 February 1979 and it was published 12 February 1979. Due to the urgency nature of this procurement, the synopsis post-dates the award. Since this was an informational synopsis, we do not believe that Aydin-Vector suffered any detriment."

In response to the Navy's review of the procurement history, A-V argues:

(1) There is no justification for procuring 21 units to cover "contingencies" since the exact number of "training firings in which the units are used" is known;

(2) Rather than conduct an immediate competitive procurement for the then-current "A" model in mid-1978, the Navy chose to use the "most time-consuming of procurement methods, two-step formal advertising," to procure the "B" models;

(3) The gap in inventory requirements prompting the sole-source contract should have been apparent in either July or August 1978--thereby allowing sufficient time for a competitive procurement of the 120 "A" units "with ample time for a new contractor such as A-V to qualify its equipment prior to delivery";

(4) The sole-source award to Microcom will result in increased costs of over \$200,000 compared with costs projected to result from competitive procurement for the items.

Analysis

(keyed to the above-numbered paragraphs)

(1) The Navy explains that the contingency giving rise to the need to purchase 21 additional items mainly relates to the possibility of additional requirements developing. We cannot question the need to plan for the contingency. In any event, since A-V does not contest the need for 99 of the items, we cannot question the propriety of the award.

(2) This ground of protest questions the issuance and method of the competitive procurement--matters readily apparent in the solicitation as issued; nevertheless, A-V did not question either the issuance or the method of procurement in which the firm participated prior to the step one closing date (January 4, 1979). Consequently, this ground of protest is untimely filed. See 4 C.F.R. § 20.2(a) (1978); Mobility Systems, Inc., B-191074, March 7, 1978, 78-1 CPD 179.

(3) Assuming that the inventory gap for "A" items (commencing in June 1979 after the expiration of the current General Services Administration contract for the "A" models) should have been realized in July-August 1978, the Navy's position is that A-V could not have qualified for a competitive contract containing an initial September 1979 delivery date. As stated by the contracting officer for the sole-source procurement:

"[A]ny other company [including A-V] would require six months for qualification of first article units and an additional seven months for manufacture of the first batch of production units."

Since the Navy projected a total of 13 months for A-V to qualify after award under a competitive procurement, A-V's projected qualification time, when added to the time consumed by the procedures leading up to the possible selection of A-V under a competitive procurement, would overrun the needed initial delivery date even if the Navy had issued a competitive solicitation for the 120 "A" units in July-August 1978.

(4) As to the alleged excess costs involved in the Microcom award, the contracting officer, prior to award, noted that:

"This procurement is below the \$1 million threshold for * * * Should-Cost considerations. A Certificate of Current Cost or Pricing Data has been requested and no award will be made until it is received."

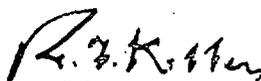
Since the Navy insisted on receiving the cost certificate and because the Navy had only a short time in January 1979 within which to make the award, we cannot question the Navy's compliance with the requirement in Defense Acquisition Regulation (DAR) § 3-807.1(d) (1976 ed.) which provides:

"Some form of price or cost analysis is required with every negotiated procurement action. The method and degree of analysis, however, is dependent on the facts surrounding the particular procurement and pricing situation.
* * *"

In any event, A-V's argument about excess costs is founded on a comparison of the January 1979 price of Microcom's contract compared with the April 1979 step two prices under the competitive procurement. Although from the benefit of hindsight the reasonableness of Microcom's sole-source price is open to challenge under this comparison, we cannot question the January award based on the facts in existence then. Nevertheless, sole-source contracts made under urgent circumstances, as here, are, by their nature, subject to the possibility of price excesses. We trust that the current competition for this item will avoid these sole-source situations in the future.

Based on our review, we cannot question the Microcom award.

Protest denied.


Deputy Comptroller General
of the United States